

**KAREN J. PHILLIPS**  
Claimant

**HOMELAND STORES, INC.**  
Respondent

**ROYAL INSURANCE COMPANY**  
Insurance Carrier

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## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

## ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?

(2) What is claimant's average weekly wage?

At oral argument before the Appeals Board, the parties stipulated that the average weekly wage of \$350 found by the Administrative Law Judge in the Award is appropriate and this is no longer at issue before the Board. The Appeals Board, therefore, adopts the Administrative Law Judge's finding that claimant's average weekly wage is \$350 based upon a 40 hour week at \$8.75 per hour.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant was a deli manager and worked in the bakery for respondent, Homeland, for five years. In October 1994, she began developing symptoms in her right upper extremity including her shoulder. Claimant was referred to orthopedic surgeon George Lucas, M.D., on October 14, 1994. At that time, claimant had positive Tinel's signs bilaterally and a positive Phalen's test bilaterally. Dr. Lucas noted claimant did have symptoms in her left upper extremity at the time of the first visit. However, by the time claimant returned to Dr. Lucas in November 1994, her complaints were limited to the right upper extremity. Dr. Lucas performed carpal tunnel surgery and a trigger finger release on the right upper extremity on March 28, 1995. Claimant has remained unemployed since that date.

By May 11, 1995, Dr. Lucas felt claimant could return to work if she would avoid heavy gripping and, on May 15, 1995, he gave her a note stating the same. However, by that time, respondent's grocery store had closed.

Dr. Lucas saw claimant in August 1995 at which time he thought she had residuals of the carpal tunnel syndrome on the right side resulting in a 5 percent impairment of the right hand. She had a 3 percent impairment of the hand as a result of loss of motion of the finger, totalling an 8 percent impairment of the right hand. Claimant was advised against heavy lifting.

Claimant was examined by Dr. Ernest R. Schlachter at her attorney's request on January 15, 1996. By that time claimant was experiencing positive bilateral Phalen's and reverse Phalen's in her wrists. In addition, claimant had entrapment neuropathy of the ulnar nerve at the elbow bilaterally. Claimant had a markedly positive Tinel's sign bilaterally at the elbow with tenderness to palpation over the medial epicondyle of both elbows. Dr. Schlachter assessed claimant a 15 percent impairment of function to the right upper extremity and a 10 percent impairment of function of left upper extremity, which, combined, equates to a 15 percent whole body functional impairment.

It is significant that claimant has suffered from diabetes for many years which predisposes claimant to develop neuropathy more easily than other people.

Claimant returned to Dr. Lucas on both March 8, 1996, and March 29, 1996. At that time, she had complaints of pain over the lateral aspect of her right elbow with ongoing pain and weakness in her right hand. Dr. Lucas increased claimant's functional impairment to 10 percent for the right upper extremity. Dr. Lucas was unable to explain the increase in claimant's symptoms as claimant wasn't working and he would have expected her condition to improve.

The Administrative Law Judge, in considering the medical reports and testimony, found Dr. Lucas to be the more persuasive as the treating physician. The Appeals Board finds the Administrative Law Judge's Award, based upon Dr. Lucas's functional impairment of the right upper extremity, to be appropriate as it is based upon the most credible evidence in this case. Dr. Lucas had the opportunity to examine and to treat claimant for a period of one and one-half years while Dr. Schlachter had the opportunity to examine claimant on only one occasion. The Appeals Board, therefore, finds appropriate the Award of 12.5 percent to the right upper extremity and the Award of the Administrative Law Judge is affirmed.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 3, 1997, granting claimant a 12.5 percent functional impairment to the right upper extremity should be, and is hereby, affirmed in all respects.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectfully disagree with the majority opinion. A close review of Dr. Lucas's deposition and medical notes indicates that he never reexamined Ms. Phillips' left arm or hand after their initial meeting in October 1994 when he diagnosed bilateral carpal tunnel syndrome and trigger finger on the left middle finger. Dr. Lucas did not rate the left arm because Ms. Phillips allegedly did not complain about it after the first visit:

- Q. Can you explain to the administrative law judge why you have not rated the left arm?
- A. Well, she's had no additional complaints; although, the first time I saw her she was complaining of bilateral troubles. She never subsequently complained of the left side except for -- I'm not so sure she complained of that again on the left side.
- Q. Why don't --
- A. I don't think she ever did.

The majority has taken that testimony and concluded that Ms. Phillips did not permanently injure her left arm. I disagree with that analysis.

Without reexamining the left arm, Dr. Lucas would have no basis to conclude that it was either injured or not. Therefore, the only medical opinion with an adequate foundation and basis is that of Dr. Schlachter who testified that Ms. Phillips has a 15 percent functional impairment for the right upper extremity and a 10 percent functional impairment for the left.

Based upon this record, I find that Ms. Phillips has bilateral upper extremity injuries and, therefore, she is entitled to permanent partial disability benefits for a nonscheduled injury under K.S.A. 44-510e.

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BOARD MEMBER

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BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS  
William L. Townsley, III, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director